Mandatory CPD 2013

Australian Consumer Law

Real Estate
Agents and Business
Brokers

Distance Learning
Participant Manual

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IMPORTANT

This workbook and the accompanying presentation have been prepared by REIWA for educational purposes only, as part of the Department of Commerce Compulsory Professional Development Program.

It is not, and should not be construed as, legal advice.

Any person in doubt as to their legal rights and obligations should seek the advice of a suitably qualified and competent legal practitioner.
Contents – Australian Consumer Law

1. Welcome to Mandatory CPD for 2013
2. Introduction to Australian Consumer Law
3. Overview of regulatory powers
4. Misleading or deceptive conduct
5. False or misleading representations
6. Promises, predictions and opinions
7. Advertising
8. Unconscionable conduct
9. Unfair contract terms
10. Consumer Guarantees under the ACL
Welcome to Mandatory CPD for 2013

The Department of Commerce (the Department) welcomes you to the Compulsory Professional Development (CPD) program for 2013.

The purpose of the CPD program is to assist industry members in updating and developing their knowledge and skills in the areas of industry practice and legislative requirements.

The Department trusts you will find it an enjoyable and rewarding experience.

The Department has determined the subject matter for all Mandatory sessions in 2013.

The subject to be covered in this session is:

Australian Consumer Law focusing on:
  o Misleading or deceptive conduct
  o Unconscionable conduct
  o Unfair contracts

Any questions arising out of this training may be addressed to the Department of Commerce on 1300 136 237.
Introduction to Australian Consumer Law

What is Australian Consumer Law?

The Australian Consumer Law (ACL) is the result of a broad cooperative reform carried out by the Commonwealth and state and territory governments. The ACL is similar in all jurisdictions, although differences do exist, and concerns consumer protection and fair trading.

The Commonwealth ACL is a schedule to the Competition and Consumer Act 2010, which replaces the Trade Practices Act 1974 (TPA), and is administered by the Australian Competition and Consumer Commission (ACCC).

The Western Australian ACL (ACL (WA)) is a schedule to Western Australia's Fair Trading Act 2010, which replaces the Fair Trading Act 1987. The ACL (WA) is administered in Western Australia by the Department of Commerce (DOC).

Agents and their employees need to understand the law and comply. Legal action can be taken against businesses and individuals who breach the ACL by either the ACCC, the DOC, or by anyone else they interact with commercially, for example:

- people who have enquired about, bought or leased a property;
- owners for whom they are acting to sell or lease property;
- competitors - e.g. claiming anti-competitive conduct;
- suppliers - e.g. claiming unconscionable conduct;
- employees - e.g. claiming to have been misled.

What does the ACL cover?

The ACL applies to:

- the supply of goods or services;
- the sale or grant of interests in land, and
- the supply of financial products or services.

The ACL as it relates to real estate transactions includes:

- a general ban on misleading or deceptive conduct in trade or commerce;
- a general ban on unconscionable conduct in trade or commerce;
- a provision making unfair contract terms in consumer contracts void;
- a ban on specific unfair practices in trade or commerce;
- the safety of consumer goods and product-related services; and
- the making and enforcement of information standards.

The ACL also sets out offences and defences that may be offered under the law, together with enforcement powers and remedies. These range from criminal prosecution, civil pecuniary penalties to fines and warnings.

Businesses should not look at ACL as the TPA rearranged and with a few additions. There are substantial changes now in place and agency owners, licensees, managers and employees need to be aware of the risks associated with breaches of the law.
Let’s look firstly at what you know about ACL.

**Activity 1**  What do you know about the ACL?

Q1
Can an agency fully indemnify officers and directors against prosecution under the ACL?

Q2
A group of real estate agents in a regional area agreed not to hold open houses on Sundays as they felt that this interfered with their family life. Does this constitute a breach of the ACL?

Q3
An advertisement headline stated ‘buy and prosper in a suburb with a history of over 10% annual growth for over 10 years’. What are the potential issues under ACL related to making such a bold statement?

Q4
An agency sold a property where a meth lab had been operating. They were not aware of the former use, so did not disclose this to buyers. Is the agency liable in any way under the ACL?

Q5
Ad copy for a sales position in an agency included the following wording: ‘Unsurpassed earnings’. ‘Learn from the best of the best in WA’s fastest growing agency!’ Do you think that this wording exposes the agency to any risk under the ACL? If so, why?

Q6
A prospective buyer of a business was given the previous year’s trading figures but not the figures from the quarter just past, which showed a severe downturn. What might the implications be for the broker under the ACL?

The answers to these questions will become clear as you progress through this training course and are summarised on page 33.
Regulatory powers under the ACL

The ACL provides powers, penalties and remedies that can apply when the ACL is breached, or there are suspected breaches. Although most of these apply to businesses, individuals are also able to be penalised for breaches so agents and business brokers should make their staff aware of the risks and requirements.

New national enforcement powers

Enforceable undertakings: if a person thinks they might have breached the ACL, the person can offer the regulator an undertaking that they will not do it again and take steps to improve compliance. If accepted by the regulator, the undertakings are court-enforceable.

Substantiation notices: regulators can issue a notice to a business seeking information about claims made in the marketplace to determine if they are genuine and whether further investigation is necessary.

Public warning notices: regulators can issue a public warning notice about traders where the regulator has reasonable grounds to suspect that the trader may have breached certain provisions of the ACL, or has refused or failed to respond to a substantiation notice.

Remedies that can be applied by regulators

Civil pecuniary penalties: regulators can seek monetary penalties for contraventions of the ACL that are proven to the civil standard—that is, on the balance of probabilities.

Disqualification orders: regulators may apply to a court for an order disqualifying a person from managing a corporation for a contravention of the ACL.

Non-punitive orders: regulators may apply to a court for a non-punitive order for a contravention of the ACL. The court may impose a remedy to redress harm suffered and to help those in breach to comply with the ACL in the future.

Adverse publicity orders: regulators may apply to a court for an adverse publicity order in respect of a contravention of the ACL.

Declarations: a Court may declare that a term in a standard form consumer contract is unfair.

Injunctions: regulators or an affected person may seek an injunction to stop a business from engaging in conduct in breach of the ACL, or to require the business to do certain things.

Damages: if a contravention of the ACL causes loss or damage to a person, they can apply to recover damages in that amount.

Compensatory orders: people affected by a breach of the ACL can seek compensatory orders for loss or damage suffered or likely to be suffered as a result. Regulators can also seek compensation on behalf of named parties.

Redress for non-parties: regulators may seek particular remedies such as refunds or contract variations to remedy a breach of the ACL in certain circumstances without first establishing the identity of exactly whom the breach affected.

This information was sourced from The Australian Consumer Law – An introduction found at www.consumerlaw.gov.au © Commonwealth of Australia 2010
How might a complaint under the ACL affect my business?

Any prosecution or action taken under consumer law can also bring about:

- adverse publicity affecting the reputation of your business;
- disclosure of sensitive documents;
- high legal costs;
- heavy demands on management and staff time;
- personal stress; and
- loss of personal reputation.

What are the financial penalties?

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<tr>
<th>Breach</th>
<th>Corporations</th>
<th>Individuals</th>
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<tbody>
<tr>
<td>Misleading or deceptive conduct (s 18 )</td>
<td>Potential compensation claim</td>
<td>Potential compensation claim</td>
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<td>Note: this is not the subject of civil pecuniary penalties or disqualification orders, however a claimant may seek financial compensation up to 6 years after the conduct took place.</td>
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<td>False or misleading representations about:</td>
<td>Up to $1.1 million</td>
<td>Up to $220,000</td>
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<td>- goods or services (s 29)</td>
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<td>- the sale of land (s 30)</td>
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<td>- employment (s 31)</td>
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<td>- some business activities such as working from home (s 37)</td>
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<td>Civil cases:</td>
<td>Up to $1.1 million</td>
<td>Up to $220,000</td>
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<td>- Unconscionable conduct</td>
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<td>- Pyramid selling</td>
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<td>- Certain instances of false or misleading conduct</td>
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<td>Infringement notices (on the spot fines)</td>
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<td>$1,320</td>
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<td>Note: if an infringement notice is not paid, the matter may result in a prosecution seeking maximum penalties</td>
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Summary Conviction Penalties

Section 32 of the FTA 2010 provides for a summary conviction penalty for offences against the ACL (WA). Where the regulator brings an action for a summary conviction in the Magistrates Court the maximum fine is the lesser of $36,000 for an individual or the penalty set out in the ACL (WA). The maximum summary conviction penalty for a body corporate is $180,000 pursuant to section 40(5) of the Sentencing Act 1995.
Balance of probabilities

One major change under the ACL is that it has become easier for regulators to prosecute. The burden of proof in civil pecuniary penalty proceedings is lower than in criminal cases.

This means that the regulator has a greater ability to bring cases to court – they only need to prove the breach has occurred 'on the balance of probabilities', rather than 'beyond reasonable doubt', required in criminal cases.

Sanctions in licensing and registration

Many actions that breach consumer law also breach the Real Estate and Business Agents Act and its Code of Conduct (the REBA Act and REBA Code).

Breaches can therefore also result in sanctions in relation to licensing and registration.

The final message

Beware! Make sure that your agency does not breach the new ACL.

Ensure that your employees undertake training in the new ACL and check that they are complying.

Activity 1 Q1 - Answer:

‘Can an agency fully indemnify officers and directors against prosecution under ACL?’

The answer is ‘No’.

There is a provision in Section 229 of the ACL that prohibits businesses from indemnifying officers and directors against some penalties or legal costs incurred for breaches of consumer law. Make sure that you understand this new provision and check with your insurers as to what you are covered for, as some policies may still refer to the TPA instead of the ACL.

In addition insurance may not cover all costs, as every policy has exclusions. Agents and their staff may find themselves facing fines, costs and loss of earnings that are not fully covered under the insurance carried as a result of proceedings for breaches of Australian Consumer Law.
Anti-competitive practices

Although this course is primarily about the Australian Consumer Law (Western Australia), it is worth noting that under other parts of the Competition and Consumer Act 2010, fines that can be levied on a business for anti-competitive practices have increased to:

a. $10 million.
b. Three times the gain made from the breach or, if this is not easily measured.
c. 10% of the turnover of the body corporate and associated companies.

The regulator can fine the business whichever is the greater amount of the three.

Fines of up to $500,000 can apply to individuals for contraventions of the Act for anti-competitive practices.

There have been cases in the past where agents have been penalised for anti-competitive practices, so it is important that agents understand and educate their employees on the kinds of behaviours that can constitute anti-competitive conduct.

The type of conduct prohibited includes:

- agreements that reduce competition e.g. market sharing, price fixing;
- misuse of market power / predatory pricing e.g. to damage small competitors;
- refusing supply unless a party deals exclusively with you;
- forcing consumers to deal with another business (3rd line forcing); and
- some mergers or acquisitions that substantially lessen competition.

The ACCC is responsible for the enforcement of the Competition and Consumer Act 2010 and there are no similar provisions under the ACL (WA) or Fair Trading Act 2010.

**Activity 1 Q2 - Answer:**

A group of real estate agents in a regional area agreed not to hold open houses on Sundays as they felt that this interfered with their family life. Does this constitute a breach of the ACL?

Yes. A consumer in the area alerted the regulator who investigated and found that the agents had engaged in anti-competitive conduct.

**Examples of ACL breaches involving real estate agents**

A successful agent's wife was starting out as a settlement agent. To help her out he offered a discount on his commission to sellers to contract her to undertake the conveyancing.

A group of agents in a small town colluded to sabotage advertising for a small competitor who was offering discounted rates. Their employees helped to do this by removing inserts from local papers distributed through their offices.
Misleading or deceptive conduct

Misleading or deceptive conduct in trade and commerce has been prohibited under Australian law since 1974. This provision is contained in Section 18 of the ACL.

Section 18 also makes it clear that as well as businesses needing to comply, employees can now be the primary defendant in legal proceedings under the ACL. Agents and business owners have an obligation to ensure employees know of this risk.

The ACL prohibits businesses and their staff from engaging in behaviour which:

- actually misleads or deceives, or
- is likely to mislead or deceive.

All kinds of conduct and communication are covered, including personal discussions, emails, SMS, letters, advertising, negotiations, advertising and others.

Misleading or deceptive conduct may include:

- lying or intentionally misleading the client;
- encouraging a wrong conclusion;
- factually correct information that gives a false impression;
- not correcting a misunderstanding;
- not updating information that has changed;
- leaving out or concealing important information;
- making false, exaggerated or inaccurate claims; and
- staying silent about material facts (non-disclosure).

Conduct that actually misleads others is generally considered relatively easy to identify. For example, a brochure that wrongly states the size of a block of land is misleading.

Conduct likely to mislead is also prohibited but may be harder to identify, without the trigger of a complaint from someone claiming to have been misled.

Business conduct is likely to breach the ACL if it creates a misleading overall impression - this is an important distinction. A misleading overall impression can be given even where the facts are accurate e.g. if the most prominent message is qualified by something in small print. For example, we have all been misled at times by signs like the following:

### Up to 50% off

Whether a message is 'likely to mislead' can also depend on the audience - agency staff need to be even more careful with first home buyers than with experienced investors.

Regulators may identify conduct likely to mislead, without waiting for a consumer complaint. They carry out random checks on issues they are concerned about - for instance monitoring real estate advertising for properties advertised under the wrong suburb or town name and monitoring price ranges in real estate advertising.
Conduct that actually misleads

A court case found in favour of investors who bought units off the plan believing that a ten-year 7% rental guarantee offered was guaranteed by an international hotel company, as implied in the brochure. The ‘guarantee’ was worthless as it was underpinned by a $2 company.

*The judge found in favour of the buyers. The parent company was liable.*

Conduct likely to mislead

Pop-up internet ads that come up when you search the name of one company yet lead you to the web-site of a different company are likely to mislead.

*The ACCC successfully brought a case against The Trading Post and Google in relation to such ads without a consumer complaint being lodged.*

Intention to mislead

It makes no difference whether you (or your employee) intended to mislead or deceive. If a complaint is made the agency will be judged on the actions and statements made and how those receiving the message perceived the conduct.

Businesses must be honest and forthcoming in what they say and do. Real estate agents and their employees must sell or lease property on its merits, not by overstating benefits, or concealing a property's downsides from a consumer.

They must also avoid misleading or deceptive conduct when dealing with owners, employees, suppliers, or anyone else they deal with in their business.

Location names

Most real estate practitioners in WA believe they would never intentionally mislead a consumer e.g. by telling a potential buyer that a property is R30 zoned if it is not. There are however a growing number of complaints of misleading conduct. If no deliberate deceit is involved, then errors or exaggerations are too common in the industry.

One practice that some agents still pursue although regulators consider it clearly misleading, is advertising properties in little known towns or suburbs under a more well-known locality name close by. This may be practical but it also may be illegal.
Encouraging a wrong conclusion or impression

A wrong impression can be given in a variety of ways. Some agents still ‘freshen up’ a property by taking it off the market for a short time and then re-advertising it as a ‘new’ listing. Many are unaware that this may be illegal as it is misleading.

Some sales people are unaware that if a prospective buyer says something that shows they have the wrong impression, the sales person has a legal duty to correct the misunderstanding. Note: verbal communications and silences can lead to prosecution - it is not just written representations that must be accurate and complete. Being vague or staying quiet can be misleading by omission.

Factly correct information that gives a false impression

A classic example of correct information being misleading is where a home was advertised as ‘walking distance to one of Perth's finest state schools'. This was perfectly true, yet the home was not within the school's catchment area - the boundary was one street away.

As many prospective buyers clearly had an interest in schools for their children, this message while accurate gave a misleading overall impression.

Not correcting a misunderstanding

A buyer may express enthusiasm for the subdivision potential of a property. If the agent knows that the current owners have tried and failed to secure subdivision approval, and they stay silent, that is deceptive conduct. Silence is not golden.

Not updating information that has changed

A seller who has been told the value of a property is $X, based on current recent sales in the area must be informed if new information becomes available that impacts on the value (e.g. a recent sale that is significantly higher or lower). Court cases have arisen from failure to do this.

Leaving out or concealing important information

Activity 1 Q3 - Answer

An advertisement headline stated ‘buy and prosper in a suburb with a history of over 10% annual growth for over 10 years'. What are the potential issues under the ACL related to making such a bold statement?

In this case there had been more than 10 years of growth averaging over 10%, so the ad was factually correct. The overall impression that values were still growing was not correct, as the long period of growth had ended 12 months earlier. The suburb had lost 14% in value in the past year. Leaving out this fact made the advertising misleading, as it created an impression that over 10% growth could be expected now and in the future.

Making false, exaggerated or inaccurate claims

Sometimes the enthusiasm of a salesperson creates grounds for a claim of misleading or deceptive conduct because they exaggerate. There is a particular risk where selling off-the-plan properties, as the developer may present the agent with information about the units for sale, and then later scale back what they deliver to meet rising costs.
Legal experts have recommended that agents and representatives stick to the developer’s marketing materials and statements about the property, making it clear that they do not warrant them, and point out any clauses that allow the developer scope to vary. Questions can be sent to the developer to be answered.

**Staying silent about material facts (non-disclosure)**

A good example of this is a case in recent years involving non-disclosure of water seepage after heavy rain in downstairs rooms of a home for sale. The agent was aware of the problem and therefore had an obligation to inform buyers of it.

**Activity 2  Misleading impressions**

Below is part of an advertisement used to sell a 5 year old ex-display home in Jolimont. How might this advertisement risk breaching the ACL?

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*Subi Style*

*Unique Award Winning Architect Designed Home*

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The answer to this Activity can be found on Page 34
Disclosure of material facts

Failure to mention 'material' facts about a property offered for sale or lease can be misleading or deceptive conduct under s18 of the ACL even if there is no intention to mislead.

If non-disclosure causes loss or damage, affected parties may take action against the seller, their agent and even the sales representative, to recover losses.

Full disclosure is the best protection from accusations of misleading or deceptive conduct. Several facts agents should keep in mind include:

- If a complaint is made, the onus is on the agency to show that they took reasonable steps to verify the facts material to the sale (or lease).
- Everyone involved in a transaction must be made aware of material facts and the need to disclose them, to avoid error, omission, exaggeration or misrepresentation - this includes employees and conjuncting agents.
- There is a duty to advise sellers and landlords of their legal obligation to disclose all relevant facts about a property to prospective buyers and tenants.
- There is a duty to disclose all material facts about a property you are engaged to sell (or lease) to prospective buyers (or tenants) not just the positive facts. It is the negatives that are most likely to cause repercussions if not disclosed.

The ACL may be breached if a material fact is wilfully concealed, mistakenly overlooked, only partly disclosed or explained incorrectly.

**Material facts include any fact that could influence a consumer’s decision about whether to buy or lease the property, and/or how much to pay.**

Agents and their employees should disclose all facts that a reasonable person would expect to be told. This might include facts that may not impact every buyer, but could stigmatise a property for some buyers.

For example in the case of the Gonzales property, a murder at the property was not disclosed to potential purchasers. The stigma for the buyers was largely because of their personal religious beliefs. The court said they and any other prospective buyers were entitled to disclosure of such a significant matter.

DOC's Real Estate News (Issue No 4, October, 2012, page 5) recently highlighted the need to disclose aircraft noise issues to prospective buyers. This includes disclosing any memorials noted on the Certificate of Title.

The type of disclosure required can vary, depending on the type of property. In the residential sector claims relating to issues like non-disclosure of unauthorised work, termite damage and proposed zoning changes are common. Rural buyers' complaints may be about incorrect land size or misleading data about yields. Commercial buyers can sue over non-disclosure of issues such as tenants who are in default, contamination, structural faults and land use issues.

Under the REBA Code, agents must seek to find out the material facts about any property they list, making all enquiries that a 'prudent' agent would make.

Making an Interest Enquiry through Landgate will reveal many types of interest including Easements, Caveats, Memorials, Covenants, Contamination and Floodplain advice. The information from such a search needs to be disclosed.
While tenants are not as likely to litigate as unhappy buyers, legally they are equally entitled to disclosure of material facts and some have made claims or sought to break their leases after finding that they have been misled.

Disclosure of material facts must occur before the signing of contracts, but not all material facts must be disclosed in all advertising. Inclusion in a brochure will however assist the agency to demonstrate that disclosure was made.

**Keeping facts up to date**

Agents and their employees must also update information given out in the course of business if they know it has become outdated, and immediately correct errors if they become apparent, advising all affected parties. Silence can be misleading

**More examples**

Consider the following situations where agencies were caught up in a legal claim:

- A buyer was not told that although a property had access to a driveway, ongoing charges would be levied for this by local government.
- Some faults about a home were disclosed (a non-compliant pool). Others were not (rising damp). The court found that partial disclosure signalled to buyers that all faults were being disclosed, so it was misleading.
- A business broker sold a restaurant not knowing (and so not disclosing) that it was being sold because of a similar restaurant opening nearby.
- An agent did not advise a seller of a recent sale impacting the value of their property. (A comparable apartment in the complex sold for much more than the seller's unit was listed for). The seller sold at a lower price, then heard of the other sale and refused to pay commission. He was awarded damages.

**Activity 1 Q4 - Answer**

*An agency sold a property where a meth lab had been operating. They were not aware so did not disclose this. Is the agency liable in any way under ACL?*

In this instance the buyers of the property found out. They succeeded in overturning the contract and claiming costs and damages because of the health risks involved.

In WA the REBA Code of Conduct requires agents to make all reasonable efforts to ascertain the facts material to a transaction, and to communicate these facts to any person who may be affected by them. DOC regards non-disclosure of a serious health hazard such as a property being a former meth lab as a breach of the code. Advice as to how to identify this risk is readily available online e.g. on the website of the Australian Drug Detection Agency at www.tadda.com.au.

While agents cannot disclose what they don't know, they must take due care in ascertaining material facts about any property or business they sell or lease.

They also need to be aware of the implications of acting on behalf of clients who seek to contravene misleading and deceptive conduct provisions. Pleading ignorance is unlikely to be sufficient to escape proceedings under the ACL.
Disclaimers and fine print

Communications must make the real terms and conditions of an offer clear.

Advertising can breach the ACL if the message is unclear because of:

- Text that is hard to read or notice because it is small.
- Text obscured by images or not placed close to the main statement.
- Text quickly flashed on a screen or voice-overs that are hard to hear.

If a message appears boldly in the headline but is diluted or contradicted in fine print, then the overall effect is likely to be misleading.

Some examples that have caused complaints against agents include:

- A print ad for a new apartment complex highlighting an estimated return with a fine print disclaimer.
- A flier of recent sales implying that the agency issuing the brochure made the sales, if sales were not all made by that agency.
- A billboard for a development showing homes with established gardens, with a price for house and land packages in bold, if landscaping is not included in the price shown. Small print stating ‘conditions apply’ will not protect you.

It is misleading to use fine print (or similar) to downplay or contradict important information that may be critical to a person’s response to an advertisement. If the overall impression is misleading, communications may breach consumer law.
Activity 3  Non-disclosure due to error
Read the case below and comment on how you believe it might have ended.

1. A cafe licensed to seat 84 people was sold with seating for over 120 people in place. The buyers believed this was the number it could legally seat and this misapprehension was not corrected by the agent. The buyer’s solicitor contributed to the situation by failing to carry out proper checks.

What do you think happened?

The answer to this Activity can be found on Page 34
False or misleading representations

The ACL also has specific prohibitions on making false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services.

A representation need not be intentionally misleading to breach the ACL.

Products and or services

The ACL prohibits false or misleading representations about specific issues including:

- the standard, quality, value or grade of goods or services;
- whether goods are new;
- a particular person agreeing to acquire goods or services;
- testimonials by any person relating to goods or services;
- sponsorship, performance characteristics, accessories, benefits etc.
- the price of the goods or services;
- a buyer’s need for the goods or services;
- any condition, warranty or guarantee on the goods and services;
- asking payment for anything a consumer is entitled to by law (e.g. a warranty).

These general provisions could be used to prosecute an agent if the way the agency’s services are marketed are false or misleading.

Standard, quality, value or grade of goods or services

An agency advertised that they were ‘the most successful agency in the area - 200 homes listed and sold this year already’. A competitor complained. When asked to substantiate the claims, the agency could not do so.

Testimonials

An online testimonial about the agency remained on an agency Facebook page, but the testimonial was not genuine - the reviewer was a friend.

An agent paid for fake online reviews to be placed on sites as if they were genuine testimonials. Both were misleading representations.

An agency advertised that the agency had a celebrity client - this was a commercial arrangement and the person had not used the agency's services.

Sponsorship, performance characteristics, accessories, benefits

An agency claimed they were ‘selling in half the time’ but had no proof of this.

Price of a product or a service

An agency advertised a package price for ‘complete property management services’ - not all services were included for the price advertised.
The buyer’s need for the services

A sales person pressed a vulnerable home owner with statements such as ‘you need to sell now before prices fall.’

Warranties or guarantees

An agency offered a warranty on all work carried out at rental properties. It was not honoured in some circumstances, but this was not pointed out in advertising.

The sale or grant of an interest in land

The ACL specifically prohibits making a false representation about:

- a sponsorship or affiliation in relation to the sale of land;
- the nature of the interest in the land;
- the price, location, characteristics or use that can be made of land; and
- the availability of facilities associated with the land.

The following are examples of actual or potential breaches under this section of the Act.

Sponsorship or affiliation in relation to the sale of land

An agency advertised a home as ‘6 green stars’ using the green star logo - the rating had not been carried out by an accredited person.

An agent told prospective buyers of off-the-plan units that a popular footballer lived at the development - he had invested, but never lived there.

The nature of interest in the land

An agent advertised a commercial property as ‘suited to strata subdivision’. This could only be achieved by buying both the building for sale and the neighbouring building, which was not for sale.

Price, location, characteristics or use that can be made of land

An agent told buyers that two penthouse apartments sold off-the-plan would have full water views. It turned out that views were blocked by a project built closer to the beach. Buyers sued the developer and selling agents. The agents settled out of court for $200,000 per owner.

Availability of facilities associated with the land

An agent sold a property off the plan, describing facilities to be added in the second stage (conference facilities, tennis courts and a restaurant). The second stage did not eventuate. The agent and developer were both held liable.
Misleading representation of price

Many complaints in the real estate sector relate to claims that an agent has misled buyers by understating the likely selling price of properties for sale, and/or knowingly marketing a property using prices below what sellers have said that they will accept. This is misleading and agents can be prosecuted. It is also possible for buyers to complain about being misled by inflated values.

The ACCC also gets complaints about over-stating and under-stating values to sellers. The following examples show scenarios involving misleading representation of properties in relation to value or price.

Underquoting to buyers and non-disclosure of beneficial interest

A real estate agent was fined for misleading price advertising. She advertised a price-range that included a low-end price she knew was not acceptable to the seller. The agent also failed to disclose a beneficial interest in the sale of land to a company of which she was a director. The court imposed a $22,000 fine on the agent and five $5000 fines on the company plus court costs.

Over-quoting to buyers

An agent published a list of recent sales in the area where he worked. The brochure showed the prices at which the properties had originally been advertised, implying they were sold for those prices. In fact buyers had negotiated the prices down to considerably less. This gave a misleading impression about values in the area to prospective buyers.

Over-quoting to sellers

An agent appraised a prestige property well above what the sellers thought it was worth. He strongly recommended they turn down an early offer an amount close to what they expected to sell for, saying he could achieve a higher price. The market fell substantially. The sellers eventually sold for $100,000 less than they thought their home was worth initially. They sought to be recompensed for the difference in price.

Underquoting to sellers

A relative of an agent knew of an elderly woman willing to sell her home for less than it was worth. He involved the agent in negotiating the sale to a developer. The agent did not give the woman an accurate appraisal. A complaint was made by the family of the seller and the contract was rescinded. The property eventually resold for a much higher price. The agency and representative were fined, disciplined by the Regulator and the agent lost his REI membership.

Key points from the ACCC

The key points the ACCC have made in the past on the issue of price are:

- Advertising or quoting a property at a price significantly less than the true estimated selling price, or less than the price the seller has indicated they are likely to accept, is misleading representation.
- When using a price range agents should get written confirmation from the seller as to the range that the seller will seriously consider and only market and advertise the property within this range.
- Agents must give sellers a realistic appraisal of property to sellers and be able to substantiate the value they appraise property at.
- It is misleading to overstate the likely selling price to property owners.
False or misleading representations about employment

It is unlawful under the ACL to make representations that could mislead a person about the availability, nature, terms or conditions of employment.

Real estate agents have been prosecuted for:

- Overstating potential earnings.
- Advertising roles without clarifying that positions are 'commission only'.
- Misleading potential employees about employment conditions.

Activity 1 Q5 - Answer

“Unsurpassed earnings”

‘Learn from the best of the best in WA’s fastest growing agency!’

Do you think this wording exposes the agency to risk under the ACL? If so, why?

The answer is yes.

‘Unsurpassed earnings’ is a superlative. Money is measurable so it may turn out to be a misleading prediction and lead to complaints against the agency if the sales person recruited earns less than they believe was promised. Saying ‘potential for unsurpassed earnings’ could reduce the risk.

Some would argue that ‘best of the best’ is puffery, but because the real estate industry has ways of measuring and recognising high achievers, a statement like this should only be made if there are grounds to justify it. It is best then to describe the achievement e.g. the agent winning a specific award in a particular year.

‘WA's fastest growing agency’ is an unqualified superlative making a claim about something factual. It is vague - in what way is the agency the 'fastest growing' (i.e. number of staff, turnover, number of sales or number of offices)? Who provided the data for comparisons? This lack of clarity makes it hard to prove.

The style of ad is risky overall because a complaint could follow if new employees are disappointed with their earnings. If challenged all the statements could be found to be misleading. The ad also fails to explain the method of payment, which could lead to complaints if it is a commission only position.

There have been several successful claims made by sales people under consumer law claiming to have been misled about earning potential.
Promises, predictions and opinions

A promise, prediction or opinion as to a future matter given in the course of business by a real estate agent is an 'implied representation'. If it turns out to be untrue and to have been made without reasonable basis, it may be a misleading or deceptive representation.

Under s4 of the ACL if a person makes a representation with respect to any future matter and they do not have reasonable grounds for making the representation, it is taken to be misleading.

When an agent or their employee makes a statement relating to the future in the course of business, the other person is entitled under the law to assume that:

- the agent or employee believes what they say is true, and
- the agent or employee has the expertise to make a well-founded prediction (or the ability to make good a promise or commitment).

If either of these is not true, there may be misleading or deceptive conduct.

Agents are consistently held by courts to be experts under the law. Consumers are legally entitled to assume that opinions given by agents and their staff are honestly held and based on rational grounds.

Agencies are at risk when opinions are given without due care - for instance if an opinion about value is given off the cuff, without a market analysis process. When a prediction is made by an employee, the agency may be in breach of the ACL even if the owner or licensee of the business is unaware of the prediction.

The ACL makes it clear that:

- Any future representation made without reasonable grounds may be found to be misleading or deceptive conduct.
- The burden of proof is on the defendant to prove they had reasonable grounds for what they said.
- Honest belief that a prediction is sound is not a sufficient defence if a claim arises - evidence of reasonable grounds for the prediction is required.

On the other hand, it is not automatically a breach if future events do not come to pass as represented.

While claims of negligence in relation to appraisals are not common, they can arise.

Agents and employees should keep copies of data compiled and calculations completed when appraising value (not just the document given to the property owner) so that they have evidence of the sound basis they had for opinions given. This can help to refute suggestions of misleading conduct.

If a property is on the market for an extended period, appraisals should be reviewed and this should also be documented. If the Appointment to Act expires then this is often a trigger to review the appraisal before renewing the appointment.

Communications advising property owners of changes in appraised value must be issued and copies held on file.
Predictions that were found to be misleading or deceptive

- A sales person told a buyer that a nearby prison would close in the near future causing the area to increase in value. Due to a change of government plans this did not eventuate and a complaint ensued.

- An agent selling a block for redevelopment gave the buyer an opinion on what townhouses the buyer planned to build on the block might sell for. This figure turned out to be overstated. He also gave a 'back of the envelope' estimate of the likely cost of building triplex units that was much lower than the real costs.

The buyer sued the agent for misleading him as to potential profitability of the project, and won.

Activity 1 Q6 - Answer

In this instance the buyers of the property found out.

* A prospective buyer of a business was given the previous year's trading figures but not the figures from the quarter just past, which showed a severe downturn.

* What might the implications be for the broker under the ACL?

The broker might be found to be complicit in misleading the buyer, as he is considered to be an expert and there could be an implied warranty of statements sellers made about the business.
Activity 4  Misleading future predictions
Consider the following scenarios:

1. A leasing agent told a prospective tenant that all shops in a new centre would be leased before the opening date. This was based on holding signed leases. This did not transpire because the anchor tenant pulled out.
   Could this be misleading conduct?

What is the risk to the agency?

2. An agency advertised a 5 star rated home with the headline "the ultimate in sustainable living - move in and forget about power bills". The home’s solar panels did not generate enough power to cover the new owner’s electricity use.
   Did the agent misrepresent the characteristics of the property?

Was there a misleading representation about the future?

What is the risk in making claims about energy efficiency

3. An agent advertised for a sales person and in negotiations claimed they would earn at least $150,000 per year. The sales person gave up a well paid position to join the agency and did not make the sum promised.
   Do you think the agent has breached consumer law?

If so, what might the consequences be?

The answer to this Activity can be found on Page 35
Advertising

Bait advertising

Bait advertising is advertising that uses a highly appealing but potentially misleading advertising message to draw customers to a business, knowing that what is offered is unlikely to be available.

Enticing prospective customers with an offer that is not genuine and/or not available for a reasonable time at the advertised price, is unlawful under the ACL.

In real estate bait advertising can take various forms.

One type of bait advertising is exemplified by the case of a developer who developed a large building with studio, 1, 2 and 3 bedroom apartments. Only 10% of apartments were studios. The developer erected a billboard advertising "new apartments from $300,000" (the price of a studio). Once these studios were all sold, the billboard remained.

Price range advertising

Another practice referred to as 'bait advertising' is where an agent advertises a property with a price range, and the bottom end of the range sits below the bottom price the seller has said they will accept.

In the past this was seen by some agents as a legitimate strategy to encourage more attendees at home opens and auctions. At times they also believed the price range was closer to what they expected the property to sell for than the seller's asking price.

Regardless of the agent's beliefs, if a seller has not said they will accept a figure, it is misleading to advertise it as part of a price range.

Misleading headlines

A variation of bait advertising is the use of misleading headlines. For instance some agencies have been criticised for using 'mortgagee sale' or 'matrimonial settlement' as a way to create the illusion that the sellers are under greater than usual pressure to sell and will therefore be more negotiable, when this is not the case.

Lease properties

Bait advertising in property management is less common, but there have been cases that have attracted regulatory attention. Leaving advertising online for extended periods after a property is let, for instance, is considered to be a form of bait advertising.

Another unacceptable practice is to advertise a property at a set rental figure and then solicit higher offers from all the interested parties, for instance where there has been a strong response and multiple applicants. This is considered bait advertising.

Both the state regulators and the ACCC have prosecuted numerous agents for bait advertising.
Justifying claims in advertising

An agent needs to be able to justify any claims made in the course of advertising.

Superlatives

All superlatives (such as 'most successful', 'best' and 'most used') are comparisons of one property or agency with all others. That means they must have a basis in fact, to be sure they are not misleading. Comparisons that are not factual can be challenged by consumers, competitors and/or the regulators under the ACL.

Cheapest

If you claim that something is the cheapest, you must have evidence.

Free offers

If making such offers ensure conditions are clearly explained and in writing. Take great care with wording. Whatever is offered free, ensure it can be honoured.

Cash back offers

Conditions must be clear so the consumer will receive what they expect.

Discounts

If a discount is advertised, it must be real and you must be able to prove this.

Price comparison 'was and now'

Any figures used when stating a former price and a new price must be genuine.

Two-tier marketing

It is illegal to market two different prices to buyers in two different markets.

Comparisons

If promoting your services as being better than those of another agency, be very careful to compare apples with apples. If you can't prove it, don't say it. If comparing properties, statements made must also be accurate, verifiable and valid.
Unconscionable conduct

The law recognises that there is a disparity of power between a real estate agent and the consumers they deal with, because the agent has greater expertise. This imbalance may be made worse by lack of explanation, poor documentation, a complex situation, or by a consumer being more vulnerable than most.

Under the ACL agents cannot unfairly exploit this imbalance of power.

The ACL (WA) does not define the conduct that will or will not constitute unconscionable conduct as it is a legal concept that is subject to change over time. The ACL sets out factors to help the courts identify unconscionable conduct. These include assessing:

- The relative bargaining strengths of the business and the consumer.
- Whether requirements were imposed on the consumers that were not reasonably necessary to protect commercial interests.
- Whether the consumer was able to understand the documentation.
- Whether undue influence or pressure, or unfair tactics were used.
- Whether the consumer could have done business elsewhere.
- The requirements of any applicable industry code.
- Whether the stronger party failed to disclose any intended conduct.
- Whether the stronger party was willing to negotiate.
- Whether the stronger party had the power to unilaterally vary terms.
- The extent to which the parties acted in good faith.

High risk situations

Situations with a higher risk of being accused of acting unconscionably include where:

- A consumer doesn’t understand advertising or contracts e.g. because of lack of literacy and/or numeracy, lack of experience or insufficient explanation.
- A consumer has an impairment - mental, physical or substance induced (e.g. they are drunk). They may have trouble understanding advertising, conditions or complex contracts. It is illegal to gain advantage because of this.
- A consumer’s age, health or social situation makes them particularly vulnerable. Pressuring an aged consumer to buy a retirement unit or a teenager to sign a lease without advice could be seen as unconscionable.
- A consumer seems likely to feel intimidated e.g. because of a disability. High-pressure sales tactics can make a consumer feel threatened.
- A consumer has few alternatives to the offer being presented - this may arise from location, financial constraints, market conditions etc.

Agencies can have significant power over consumers and should be careful not to take advantage of this power.
Examples of potential breaches

- A sales person pressed a young person buying her first property to sign 'on the spot' rather than seeking advice first, saying she would miss out if the deal was not signed that day. She signed without understanding the ongoing strata costs.

- A property manager called tenants who were behind with their rent every day for a week and threatened to have them 'blacklisted for life' on a tenancy database.

- An agent called several times within a few days of a woman's bereavement to secure a sales listing. He then pressed the seller to accept the first offer, which her family later complained was below market value.

Unfair Contract Terms

The ACL has now provided a statutory framework regarding the effect of unfair terms within consumer contracts, including property contracts.

Any unfair term in a standard form consumer contract will be void, but this will not automatically void the rest of the contract.

Consumer contracts are contracts where at least one of the parties is an individual acquiring a product or service (including an interest in land) wholly or predominantly for personal, domestic or household use. Contracts for the sale of land to individuals are likely to be consumer contracts.

To decide whether a contract is also a 'standard form contract', a Court may take into account any matter it considers relevant, but must consider:

- Bargaining power: whether a party has most of the power in the transaction.
- Contract Preparation: whether a party prepared the contract before negotiating.
- 'Take it or leave it': whether one party was obliged to accept the contract's terms.
- Opportunity to Negotiate: whether there was effective opportunity to negotiate.
- Specific Characteristics of parties/transaction: were these taken into account?
- Prescribed: any matters prescribed by Regulation.

In deciding whether a term is 'fair' or 'unfair' there are three questions:

a) Does the term cause significant imbalance in the parties' 'rights and obligations' under the contract, and

b) Is the term reasonably necessary to protect the legitimate interests of the party advantaged by the term, and

(c) Will the term cause detriment to a party if it is enforced?

Sellers and their agents should take care, particularly with clauses commonly used in the sale of off-the plan properties, as clauses that are 'unilateral' may be found to be unfair if challenged.

Contracts for the sale of interests in a retirement village are also likely to be standard form contracts.
The ACL lists a number of examples of unfair terms.

Examples include terms that allow one party, but not the other, to:

- Terminate or vary the contract.
- Vary the upfront price without the buyer being able to terminate the contract.
- Vary the characteristics of the property being sold.
- Unilaterally interpret whether the contract has been breached.
- Unilaterally interpret the meaning of the contract.
- Limit the right of one party to sue the other.

Penalising a party for breaching the contract is also seen as unfair.

In determining whether a term is unfair, the court must consider:

- how transparent the term is (is it in plain English, legible, clear etc); and
- the contract as a whole.

A term is not unfair if it:

- sets the upfront price under the contract
- defines the subject matter of the contract; or
- is required, or expressly permitted by law.

Examples

"Off the plan" contracts for sale of strata titled units

A residential "off the plan" contract will often include provisions allowing developers to vary the size, dimensions, boundaries or encumbrances affecting a lot, or change finishes, where the buyer would not be 'materially adversely affected' by the change.

These provisions may be unfair as they unilaterally allow the developer to vary the characteristics of the subject matter of the contract.

Sale of land by receiver and manager

Contracts for sale of land by receivers and managers usually include the unilateral right for the seller to extend the date for completion or to terminate the contract, where the receivers are unable to complete the contract.

These clauses may be unfair unless the right to extend or terminate is held by both parties.
Activity 5  Unconscionable conduct and unfair terms
Consider the following scenario:

A real estate agent was a senior church member and sold properties to newly arrived migrants he had met through the church at higher than market prices. The units were sold off-the-plan. The contract had an ‘Extension of completion’ clause – the developer reserved the right to unilaterally extend the completion date under a broad range of circumstances.

Is this scenario likely to be a breach of consumer law?
If so, why?

The answer to this Activity can be found on Page 36
Consumer Guarantees under the ACL

Due care and Skill

Australian Consumer Law requires (among other things) that suppliers guarantee that their services are provided with due care and skill. This is very like the requirement that exists under S9 of the Real Estate and Business Agents Act Code of Conduct to ‘exercise due skill, care and diligence’. This requirement means that real estate agents and their employees must:

- use an acceptable level of skill or technical knowledge when providing their services and
- take all necessary care to avoid loss or damage when providing their services.

One type of ‘loss or damage’ that is highly significant to property owners and could give rise to claims is fraudulent activity that leads to owners losing their property or the income from it.

Reminder to be diligent to avoid fraudulent property scams

In light of recent attempts by overseas criminals to fraudulently sell two WA homes, it is timely to remind real estate agents and their staff to be on high alert and follow suitable protocols to detect fraud attempts early.

In separate incidents, agencies were approached by fraudsters who successfully changed the contact details of the real owners of the properties. Both owners lived in South Africa. Copies of documents relating to the management of the properties were sent to the fake owners by agencies in both cases. Requests to sell the two properties, valued at $700,000 and $800,000, soon followed.

In the second case, the request to sell the property was supported by copies of fake passports, forged signatures and a letter of verification purportedly from the Australian High Commission in Pretoria, South Africa. The alarm was raised when the agency’s sales manager identified warning signs of property fraud he had learned of in presentations and educational material provided by Consumer Protection, WA Police and REIWA. In this case, scammers requested an urgent sale and promised the agency future sales. Similar tactics were used in previous scam attempts.

It is important that agents, property managers and all agency staff confirm any change in contact or bank details for properties they manage, before taking any action or releasing any information. It is clearly stated in DOC scam prevention guidelines issued to agents that confirmation of changes should first be sent to original contact addresses, both physical and email, held on file. This will alert the real owners to any attempt to steal their identity and ultimately their home.

Agents are reminded to have suitable protocols in place to prevent the possibility of their homes being sold without knowledge or permission. These protocols may include:

- corresponding with the owner of a property only using the address on file prior to agreeing to change contact details or sell a property;
- developing security questions with the owner of a property when they enter into property management deals as means of correctly confirming their identity in the future;
- making sure emails from generic addresses (e.g. Yahoo, Gmail etc.) are checked out thoroughly if such emails include requests (supposedly from property owners) for addresses or bank details to be changed, or for documents to be sent.
The Code of Conduct for real estate agents and sales representatives was strengthened in October 2011 and clear guidelines were issued to licensees and registrants on how to avoid fraud attempts being successful in the future.

DOC's Proactive Compliance Checklist has also been recently updated to include a check to determine whether property management processes are effective. Proactive Compliance Officers are required to check:

- whether agency procedures for identifying property owner/s are adequate
- whether the agency's property management area has adequate procedures to verify the identity of anyone attempting to make changes to an owner/s’ details e.g. whether the agency has a security question set up to confirm the owner/s' identity and requires a double - check if correspondence is received attempting to change contact or banking details

It is worth noting that while it is a positive that these scams were prevented, better procedures and more training for junior staff may reduce the risk of an owner's documents being divulged to scammers inadvertently.

It is anticipated that mandatory CPD training for real estate agents, sales representatives and property managers in 2014 will cover the revised Code of Conduct.

More information on the Codes of Conduct can be found on the Consumer Protection website: www.commerce.wa.gov.au/ConsumerProtection/RealEstateGuidanceNotes or agents can call 1300 30 40 54 or email: consumer@commerce.wa.gov.au.
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Activity Answers

Activity 1   What do you know about ACL?

Q1 - Can an agency fully indemnify officers and directors against prosecution under ACL?

Answer: No. S 229 of the ACL prohibits businesses from indemnifying officers and directors against some penalties / costs incurred for breaches of consumer law. Insurance may not cover all costs, as every policy has exclusions.

Q2 - A group of real estate agents in a regional area agreed not to hold open houses on Sundays as they felt that this interfered with their family life. Does this constitute a breach of the ACL?

Answer: Yes - It was an anticompetitive agreement

Q3 - An advertisement headline stated 'buy and prosper in a suburb with a history of 10% annual growth for over 10 years'. What are the potential issues under ACL related to making such a bold statement?

Answer: In the actual situation, it was misleading because the trend had reversed in the past 12 months. It is always risky to say or imply that past growth means that growth will continue.

Q4 - An agency sold a property where a meth lab had been operating. They were not aware of the former use, so did not disclose this to buyers. Is the agency liable in any way under the ACL?

Answer: The agency could be liable. Health risks from drug labs can remain for an extended period and it could be argued that a prudent agent would have noticed the signs of this misuse of the property, investigated and disclosed the risks to buyers. The regulator looks to agencies and sales people to take the need for this type of disclosure very seriously.

Q5 - Ad copy for a sales position in an agency included the following wording:
‘Unsurpassed earnings’.
‘Learn from the best of the best in WA’s fastest growing agency!’

Do you think this wording exposes the agency to any risk under the ACL? If so, why?

Answer: The highlighted words are superlatives and could be challenged if the person hired was disappointed with their earnings after starting with the agency. If the agency could not prove a factual basis for the claims they could be found to have misled the applicant.

Q6 - A prospective buyer of a business was given the previous year's trading figures but not the figures from the quarter just past, which showed a severe downturn. What might the implications be for the broker under the ACL?

Answer: The broker might be found to be complicit in misleading the buyer, as he is considered to be an expert and there could be an implied warranty of statements sellers made about the business.
Activity 2  Misleading impressions

Below is part of an advertisement used to sell a 5 year old ex-display home in Jolimont. How might this advertisement risk breaching the ACL?

Subi Style
Unique Award Winning Architect Designed Home

Answer: It is risky because:

a) The copy implies that the property is in Subiaco when it is in Jolimont.

b) The home is an ex-display home - if other homes were built to the same design it cannot be described as 'unique'.

c) Most display homes are designed by Building Designers - check that the designer was a qualified architect before making this claim.

d) It is best to say what award was won and when it was won.

Activity 3  Non-disclosure due to error

Read the case below and comment on how you believe it might have ended.

A cafe licensed to seat 84 people was sold with seating for over 120 people in place. The buyers believed this was the number it could legally seat and this misapprehension was not corrected by the agent. The buyer's solicitor contributed to the situation by failing to carry out proper checks.

What do you think happened?

This is based on a real case. The broker was found liable in spite of the fact that wrong information was provided by the sellers and the buyer's solicitor failed to do basic searches that would have clarified the licensed capacity of the cafe.
Activity 4  Misleading future predictions

Consider the following scenarios:

1. A leasing agent told a prospective tenant that all shops in a new centre would be leased before the opening date. This was based on holding signed leases. This did not transpire because the anchor tenant pulled out.

Could this be misleading conduct?

Answer: Yes

What is the risk here to the agency?

Answer: Fines or other penalties under the ACL or the Code of Conduct as well as liability for damages based on the losses of prospective tenants.

2. An agency advertised a 5 star rated home with the headline "the ultimate in sustainable living - move in and forget about power bills". The home's solar panels did not generate enough power to cover the new owner's electricity usage.

Did the agent misrepresent the characteristics of the property?

Answer: Yes

Was there a misleading representation about the future?

Answer: Yes

What is the risk in making claims about energy efficiency?

Answer: Claims must be supported by documented evidence. Ratings should be from an accredited professional. Variables such as different sized families and different ways of living mean that claims such as 'forget about power bills' are very risky.

The claim 'the ultimate in sustainable living' is misleading. 5 stars may have been good at the time the property was built, but much higher rated properties are now available. 6 star is now the minimum for newly built homes and some homes are built to 10 star standards.

Regulators are showing strong interest in stamping out misleading 'green' claims. There is also the question of rebates - these would not transfer to tenants or buyers.

3. An agent advertised for a sales person and in negotiations claimed they would earn at least $150,000 per year. The sales person gave up a well paid position to join the agency and did not make the sum promised.

Do you think the agent has breached consumer law?

Answer: Yes

There have been several cases like this and the employers have been fined and in some cases had to pay compensation.
Activity 5  Unconscionable conduct and unfair terms

Consider the following scenario:

A real estate agent was a senior church member and sold properties to newly arrived migrants he had met through the church at higher than market prices.

The units were sold off-the-plan. The contract had an ‘Extension of completion’ clause – the developer reserved the right to unilaterally extend the completion date under a broad range of circumstances.

Was this scenario likely to be a breach of consumer law?

Answer: Yes

The agent acted unconscionably by using his position in the church to take advantage of people who were vulnerable due to their recent arrival in Australia (they knew nothing of the market) and their limited English.

There is also a good chance that the extension clause mentioned would be considered unfair under the ACL because it is unilateral (i.e. it works for one party only).
DISCLAIMER:

The information provided in this publication was adapted from material prepared by the Department of Commerce, Landgate, the Australian Competition and Consumer Commission, Australian Institute of Conveyancers WA Division and the Real Estate Institute of Western Australia.

This material should not be taken as a statement of law.

REIWA and the Department of Commerce strongly recommend that you seek legal advice of a competent experienced lawyer who practices in this area if you are uncertain about your obligations under the Act, the Regulations or the Code of Conduct.

Participants may also refer to the Real Estate and Business Agents Act 1978; the Real Estate and Business Agents (General) Regulations 1979; and the Code of Conduct for Agents and Sales Representatives and any other relevant legislation.